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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANGEL LOUIS VEGA, JR., Defendant and Appellant.	B172317 (Los Angeles County Super. Ct. No. GA051544)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred J. Fujioka, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Jeffrey B. Kahan, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Angel Louis Vega, Jr. appeals from a judgment of conviction entered after a jury found him guilty of second degree murder (Pen. Code, §§ 187, subd. (a), 189) and found true the allegation he personally used a deadly weapon in the commission of the offense (*id*., § 12022, subd. (b)(1)). The trial court sentenced defendant to 15 years to life in state prison for the murder plus an additional year for the use of a deadly weapon.

On appeal, defendant claims evidentiary and instructional error. We affirm the judgment.

FACTS

Defendant lived in a trailer in Rosemead with his father, Angel Vega, Sr. (Mr. Vega), and his grandmother, Ramona Vega. His father's cousin, Mario Olivarria (Olivarria), stayed in the trailer with them. Defendant referred to Olivarria as his uncle. Defendant carried and slept with a five-inch fixed-blade knife.

On Saturday, November 23, 2002, Mr. Vega, his mother, defendant and Olivarria all were home. While at home, defendant and Olivarria had appeared to be getting along with one another. They bickered occasionally but did not fight. Defendant had challenged Olivarria to a fight but Olivarria ignored him.

Defendant left the trailer and went to Monterey Park where friends of his, Pete Rangel (Rangel), Carlos Cruz (Cruz) and Alejandro Benevides (Benevides), lived near one another. Olivarria arrived on a bicycle a short time later. At about 3:00 p.m., Cruz arrived home. He saw defendant and Olivarria near his garage and went over to talk to them.

Rangel and Benevides arrived about 15 minutes later. The group talked and joked. Everyone laughed. Then Benevides and Cruz went to their respective homes for a brief period. Defendant and Olivarria began arguing and Rangel decided to go home. Rangel stayed there for seven or eight minutes.

Cruz came back outside and found defendant and Olivarria "hugging" one another in the garage. Cruz did not see a weapon and thought defendant and Olivarria were playing. Olivarria then started to run. He fell, holding his neck, asking, "Help me." Cruz went to him and saw he was bleeding from his chest. Defendant left the scene. Rangel and Benevides returned, and Benevides called the paramedics. Olivarria was taken to the hospital.

Olivarria suffered 18 stab wounds, some of which damaged his heart and liver. Although surgeons repaired the damage, he died on December 7, 2002 of complications from the wounds, including infection and pneumonia.

Monterey Park police arrived at the scene at 3:45 p.m. on November 23. They found beer cans, a knife sheath, and a bicycle. Defendant's fingerprint was on one of the beer cans. The police also found blood on the garage door and on a car outside the garage.

Officer Armando Esparza spoke to Cruz, Rangel and Benevides. Although Cruz appeared to be intoxicated, he understood the officer's questions and gave intelligible answers. He said he saw defendant and Olivarria fighting; defendant hit Olivarria multiple times with his right hand, then defendant left on his bicycle. Although Cruz expressed reluctance to identify anyone, concerned that he would be labeled a snitch, he described defendant and told the officer where the defendant lived. He eventually identified defendant from a photographic lineup.

The police went to the Vegas' trailer, looking for defendant. He was not there.

The next day, Salvador Lucero (Lucero) visited his sister, defendant's mother, Lucille Vega, at her home in El Monte. He left the house with defendant, and they eventually went to the Vegas' trailer so defendant could pick up some clothing. As they left, Mr. Vega said that the police were looking for defendant. Lucero then took defendant to the home of defendant's girlfriend, Lorraine Soliz (Soliz).

After defendant left, Mr. Vega called the police. When Officer Arvar Elkins responded to the Vegas' trailer, Mr. Vega told him defendant had been there and left,

describing the car in which defendant and Lucero had been riding. He gave the officer a possible address for defendant, that of Lucille Vega.

About a week after the stabbing, Cruz saw defendant. He reprimanded defendant and asked about Olivarria's condition. Defendant said he did nothing and Olivarria was fine.

Detective Keith Bacon tried to interview Olivarria at the hospital. Hospital personnel explained that Olivarria was intubated and medicated and thus unable to answer questions. Olivarria died before Detective Bacon could speak to him.

Soliz was arrested for burglary on December 18, 2002. She told Monrovia Police Officer Nick Manfredi that sometime before Thanksgiving defendant told her that he planned to beat his uncle. She added that later, defendant seemed uncharacteristically withdrawn. Defendant told her he had made good on his plan. Defendant asked her to call the hospital to check on Olivarria's condition. She later received a call from defendant's mother, who asked her to hide defendant. She agreed to do so before realizing how seriously Olivarria was injured.[1]

Defense

Lucille Vega lived in El Monte with her mother, her 15-year-old daughter, P., and her 5-year-old son, A.. On Friday, November 22, 2002, Margaret Betancourt (Betancourt) came to visit and stayed overnight.

Defendant arrived at the home about 10:00 a.m. the following morning. He asked his mother to make breakfast for him. He watched television with A. all day. P. went to a swap meet but returned mid-afternoon and joined defendant and A.. The family had dinner around 4:00 p.m.. Defendant went to sleep on the floor about 10:00 p.m. Betancourt became ill that night. Lucille Vega and P. used Betancourt's illness as a reference point to remember the events of the day.

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1 When she testified, Soliz denied making these statements to Officer Manfredi.

Retired fingerprint examiner Howard Sanshuck (Sanshuck) agreed that a fingerprint on a beer can found at the scene belonged to defendant. He explained, however, that a print could remain on a can for as long as a year. The orientation of the print was inconsistent with a person holding the can to drink from it but not inconsistent with a person transferring the can from one hand to another.

CONTENTIONS

Defendant contends the trial court's exclusion of evidence of Olivarria's involvement with drugs violated his rights to present a defense, to compulsory process and to a fair trial, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. There was no error or deprivation of defendant's constitutional rights in the exclusion of the proffered evidence.

Defendant further contends the trial court violated his rights to present a defense, to compulsory process and to a fair trial when it excluded Olivarria's statement that defendant was not the person who stabbed him. The trial court did not abuse its discretion in excluding the statement.

Defendant asserts the trial court erred in admitting autopsy photographs. There was no abuse of discretion in admitting the photographs.

Defendant additionally asserts the trial court erred in instructing the jury with special instruction S1, which incorrectly stated the law of voluntary manslaughter and undermined one of his defenses, violating his right to due process of law. This assertion has been waived.

Finally, defendant contends his conviction must be reversed based upon cumulative constitutional error. There was no cumulative constitutional error. Reversal is not required.

DISCUSSION

Evidence of Olivarria's Involvement With Drugs

The People filed a motion to exclude evidence of alleged third party culpability, which they anticipated that defendant would seek to introduce. In response, defendant moved to allow the introduction of evidence of Olivarria's character and reputation as to drug use and drug related activity, pursuant to Evidence Code section 1103, subdivision (a). Specifically, defendant wanted to introduce evidence that Olivarria used and abused drugs, was unsuccessful at rehabilitation, and had been in debt to drug suppliers. One family member had lent money to him to pay a supplier so that no harm would come to him. Defendant claimed this evidence was "highly probative . . . of the victim's character which in turn exposed him to the perils of that character."

The trial court excluded the evidence. It found the evidence too speculative to be relevant. It also found that the evidence did not rise to the level of creating a reasonable doubt as to defendant's guilt. In addition, the court found defendant's alibi defense was not dependent upon whether or not he could show a motive for Olivarria's killing.

Evidence of third party culpability is admissible if it is capable of creating a reasonable doubt as to the defendant's guilt. (*People v. Lewis* (2001) 26 Cal.4th 334, 372.) The court is not required to admit "'any evidence, however remote, . . . to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citation.]" (*Ibid*., quoting from *People v. Hall* (1986) 41 Cal.3d 826, 833.)

The question whether evidence of third party culpability is admissible is one of relevancy. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 372; *People v. Hall*, *supra*, 41 Cal.3d at p. 834; see Evid. Code, § 350.) The trial court has the duty to determine the relevancy and thus the admissibility of evidence before it can be admitted. (Evid. Code, §§ 400,

402.) We review the trial court's determination for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Here, the evidence defendant sought to introduce would have established, at best, a possible motive in an unknown third party to kill Olivarria. As set forth above, without some additional evidence linking the third party to the actual perpetration of the crime, the evidence was inadmissible. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 372; *People v. Hall*, *supra*, 41 Cal.3d at p. 833.) It had no "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" and thus was irrelevant. (Evid. Code, § 210.)

The trial court therefore did not abuse its discretion in excluding the evidence. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 717.) Defendant was not deprived of his constitutional rights by the exclusion of evidence of third party culpability. (*People v. Lewis*, *supra*, 26 Cal.4th at pp. 373-374; *People v. Alcala* (1992) 4 Cal.4th 742, 793.)

Defendant claims the evidence also was admissible under Evidence Code section 1103, subdivision (a), which provides that "[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

Defendant argues that evidence of Olivarria's drug use "supported the inference he was more violent than ordinary people and under greater financial pressure." The evidence would have supported a defense of self-defense or imperfect self-defense.

Defendant did not put forth this theory of admissibility in his motion to admit the evidence. This waives any claim of error on appeal. (Evid. Code, § 354; *People v. Fauber* (1992) 2 Cal. 4th 792, 854.)

Moreover, defendant did not seek to introduce evidence of Olivarria's character for *violence* and his conduct in conformity therewith. He sought to introduce evidence of

Olivarria's drug use and possible drug debts. Evidence Code section 1103, subdivision (a), is therefore inapplicable.[2]

Olivarria's Statement

Prior to Mr. Vega's testimony, the trial court held a hearing under Evidence Code section 402 concerning Olivarria's statement as to who stabbed him. Mr. Vega visited Olivarria in the hospital four or five days after the stabbing. Defendant's grandmother had visited him previously; she told Mr. Vega that Olivarria had been stabbed, was swollen and was in intensive care.

When Mr. Vega visited Olivarria in intensive care, Olivarria was hooked up to machines, had intravenous tubes in his arms and a tube in his mouth. Olivarria recognized Mr. Vega and squeezed his hand. Mr. Vega asked him, "Did Angel have anything to do with this?" Olivarria looked at Mr. Vega, opened his eyes wider and shook his head no. Mr. Vega asked him if he knew who had done it. Olivarria again shook his head no. The visit lasted about an hour.

It looked to Mr. Vega that Olivarria wanted to tell him something, so Mr. Vega handed him a pen and paper. Olivarria wrote "No mom." Mr. Vega thought he was trying to say that he did not want defendant's grandmother to come see him.[3]

Defense counsel sought to admit Olivarria's statement that defendant did not stab him under three exceptions to the hearsay rule: as a spontaneous statement (Evid. Code,

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[2] Inasmuch as the evidence of Olivarria's drug use was inadmissible both to prove third party culpability and under Evidence Code section 1103, subdivision (a), any deficiencies in trial counsel's showing in the trial court did not amount to ineffective assistance of counsel. (*In re Avena* (1996) 12 Cal.4th 694, 721.)

[3] In opposition, the prosecution offered Olivarria's medical records, showing that he was being given fentanyl, a strong narcotic. The prosecution stated that the records also showed Olivarria was unaware of his surroundings and had to be restrained to keep him from pulling out the tubes attached to him. The trial court admitted the records but stated that it would not change its ruling in the matter, in that there was no evidence as to the impact of the medication on Olivarria.

§ 1240), as a dying declaration (*id*., § 1242) and to show state of mind (*id*., § 1250). The trial court ruled the statement was not admissible as a spontaneous statement, in that it was made days after the stabbing, Olivarria was under the effects of medication, and it did not appear that he was still under the excitement of the stabbing. The statement was not admissible as a dying declaration, in that there was no evidence Olivarria had a sense of his impending death. It was not admissible to show Olivarria's state of mind, in that his state of mind was not relevant. Moreover, the defense was seeking to admit the statement to show that defendant did not stab Olivarria, not to show Olivarria's state of mind.

Evidence Code section 1240 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." Although the statement here was made a number of days after the stabbing, "'[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.'" (*People v. Raley* (1992) 2 Cal.4th 870, 893.)

Defendant argues that the evidence here shows Olivarria was still "under the stress of excitement caused by" the stabbing. He was in the intensive care unit, hooked up to machines, with a tube down his throat, and "[a]s soon as [Mr.] Vega asked if [defendant] were involved, [Olivarria] looked [him] in the eye and shook his head no." We disagree that this evidence shows Olivarria was still under stress caused by the stabbing. He had been in the hospital for four or five days, giving him time for reflection. There was no evidence he had been unconscious or suffered head trauma which would have precluded him from reflecting on the incident while in the hospital. (See, e.g., *People v. Raley*, *supra*, 2 Cal.4th at pp. 893-894.) There was no evidence of stress or excitement caused by the stabbing; Olivarria only communicated with Mr. Vega after questioning.

Accordingly, the trial court did not abuse its discretion in refusing to admit the statement as a spontaneous statement. (*Id*. at p. 894.)

The dying declaration exception to the hearsay rule applies to a statement "made by a dying person respecting the cause and circumstances of his death . . . if the statement was made upon his personal knowledge and under a sense of immediately impending death." (Evid. Code, § 1242.) The requisite "sense of immediately impending death" "may be shown by the declarant's own statements to that effect, or inferred from circumstances such as the declarant's physical condition, the extent of his injuries, his knowledge of his condition, and other types of statements made by the declarant." (*People v. Sims* (1993) 5 Cal.4th 405, 458.)

Here, there was absolutely no evidence that Olivarria had a "sense of immediately impending death." While his injuries were severe, they had been treated, and he had been in intensive care for four or five days. There was no evidence anyone told him he was dying, or he asked anyone if he was dying. Under the circumstances, the trial court did not abuse its discretion in refusing to admit Olivarria's statement as a dying declaration. (*People v. Gatson* (1998) 60 Cal.App.4th 1020, 1024.)

Evidence Code section 1250, subdivision (a), provides that "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." Defendant argues that Olivarria's statement that defendant did not stab him "demonstrates absence of antagonism between" the two.

Under Evidence Code section 1250, subdivision (a), Olivarria's statement could be admitted to show that Olivarria bore no antagonism toward defendant. Olivarria's state of mind was not relevant, however. The relevant issues were *defendant's* state of mind and actions. Section 1250 does not permit the admission of Olivarria's statements to

prove defendant's state of mind or that defendant did not stab him. (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 595-596; *Benwell v. Dean* (1967) 249 Cal.App.2d 345, 350.) The trial court therefore did not abuse its discretion in refusing to admit Olivarria's statement under the state of mind exception to the hearsay rule. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Defendant further contends that exclusion of Olivarria's statement, even if it did not fall within a recognized exception to the hearsay rule, was error, in that it deprived him of his constitutional right to present a defense. (U.S. Const., 6th Amend.) Inasmuch as defendant failed to raise this ground for admission of the evidence below, he has waived his contention on appeal. (Evid. Code, § 354; *People v. Fauber*, *supra*, 2 Cal.4th at p. 854; cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119, fn. 22.)

In any event, it is true the hearsay rule cannot be applied mechanistically with the result that a defendant is deprived of his right to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Hearsay should not be excluded, even if it does not fall within a recognized exception to the hearsay rule, when its exclusion would violate the defendant's right to present a defense and the hearsay bears "persuasive assurances of trustworthiness." (*Ibid*.) Here, however, Olivarria's statement bore no persuasive assurances of trustworthiness. Olivarria was hospitalized, on strong medication and unable to speak. There thus was no evidence as to his degree of understanding and no way of verifying precisely what he meant when he shook his head in response to Mr. Vega's questions. The lack of assurance of reliability justified the exclusion of the statement.

Admission of Autopsy Photographs

The prosecution sought the admission of four autopsy photographs showing Olivarria's wounds. Defendant objected pursuant to Evidence Code section 352, arguing that the photographs were inflammatory and unnecessary, in that the prosecution also was seeking admission of the diagrams of the wounds made during the autopsy.

The trial court found photographs 3 and 4 probative of the People's theory of how the killing occurred and not inflammatory, in that they just showed Olivarria's hands and arms. The trial court found photograph 2 was "a little more gruesome because you're showing the torso, but you don't see the head or the face. And although it's disturbing, because it depicts a body that received some serious injuries, I don't find it particularly inflammatory or gruesome."

The trial court found photograph 1 was "the closest to being objectionable," in that it showed portions of Olivarria's face. The court asked for an offer of proof from the People. The prosecutor explained that the photograph would help the jury appreciate where the injuries were and "the actions that were necessary to inflict those injuries." The diagrams of the wounds were clinical, but it would be "probative to have color photos that demonstrate the significance of the doctor's testimony as it relates to the orientation of the injuries, depths of the injuries, concentration of those injuries over various portions of the body, and this is the best evidence."

The trial court ruled: "Under [section] 352 of the Evidence Code, on balance I don't find them excessively gory or inflammatory. It's a homicide and so, well, any facts that depict a dead human being . . . [are] disturbing. I don't find these photographs to be particularly gruesome or inflammatory. For that reason, they're admissible."

Evidence Code section 352 provides the trial court with the discretion to exclude evidence if the probability of undue prejudice resulting from its admission substantially outweighs its probative value. Unduly prejudicial evidence is that which "uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) The trial court has wide discretion to exclude evidence under Evidence Code section 352. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) The trial court's exercise of its discretion will not be disturbed on appeal absent an abuse of discretion (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070), i.e., if it exceeds the bounds of reason (*DeSantis*, *supra*, at p. 1226).

Photographs depicting a victim's wounds that support the prosecution's theory of the case, even if graphic, are admissible. (*People v. Lewis* (2001) 25 Cal.4th 610, 641-

642.) Here, the trial court examined the proffered photographs and found they were not "particularly gruesome or inflammatory," thus their probative value outweighed any prejudicial effect they might have had. We find no abuse of discretion in the trial court's ruling. (*Ibid*.)

Special Instruction S1

After instructing the jury pursuant to CALJIC No. 8.42 on the sudden quarrel or heat of passion necessary to reduce an unlawful killing from murder to manslaughter, the trial court instructed the jury pursuant to the People's Special Instruction S1: "If you believe that the defendant was provoked to commit the act that resulted in the death of the victim, you must determine the source of that provocation. [¶] The excuse of heat of passion only applies if: [¶] 1) It was the victim who provoked the defendant; or [¶] 2) The defendant reasonably believed that it was the victim who engaged in the provocative conduct. [¶] If the provocation came from another source other than the victim, the heat of passion that may have been aroused does not excuse the defendant's conduct."

Defendant did not object to this instruction or request that it be modified in any way. He now contends the instruction was erroneous, in that it failed to inform the jury that the provocation necessary to reduce a murder to manslaughter could come jointly from the victim and another individual.

As a general rule, failure to object to an instruction given waives any objection thereto. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) An exception to the rule of waiver arises, however, if the instruction affected the substantial rights of defendant. (Pen. Code, § 1259; *Rivera*, *supra*, at p. 146.) Defendant's substantial rights are affected if the instruction results in a miscarriage of justice, making it reasonably probable that absent the erroneous instruction defendant would have obtained a more favorable result. (*Ibid*.; see Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defense counsel argued to the jury that if they believed defendant "was there that day and if you believe that he got so incensed with this mention of a Chinita or a fat Chino and if you find there is some issue of heat of passion, then it cannot be murder in

the first degree. It has to be voluntary manslaughter. . . . You will be given a larger instruction on sudden quarrel and heat of passion. I'm hopeful you will review that if you believe that [defendant] was there and if you believe that they engaged in a quarrel."

In defendant's view, Special Instruction S1 was an incorrect statement of the law and undercut his heat of passion defense, in that it failed to inform the jury that the necessary provocation could come jointly from the victim and another, in this case Olivarria, Benevides, Rangel and Cruz, who laughed at him when he tried on Cruz's sunglasses. We disagree with defendant.

Special Instruction S1 was not an incorrect statement of the law. *People v. Lee* (1999) 20 Cal.4th 47 reiterates that "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citation.]" (At p. 59.)

The cases on which defendant relies to the contrary do not support his position. In *People v. Spurlin* (1984) 156 Cal.App.3d 119, the defendant argued that if there was sufficient evidence of provocation by one victim to entitle him to an instruction on manslaughter based on heat of passion, then, as to the other victim, he should be entitled to an instruction on manslaughter based on diminished capacity which resulted from the heat of passion directed at the first victim. (At pp. 126-127.) While the court found some logic in his argument, it rejected it on the ground the diminished capacity defense had been abolished. (*Id*. at pp. 127-128.) The court did not address the issue of provocation coming from more than one source.

In *People v. Bridgehouse* (1956) 47 Cal.2d 406, disapproved in *People v. Lasko* (2000) 23 Cal.4th 101, 110, the court did not address the question of the source of the defendant's provocation, whether it came from the victim or from the victim and other sources. The court simply held there was adequate evidence of provocation. (At pp. 413-414.)

Special Instruction S1 being a correct statement of the law, it was defendant's obligation to request any clarification or modification of the instruction he wished the

trial court to make. His failure to do so waived any claim of error. (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Moreover, we perceive no miscarriage of justice in the use of Special Instruction S1. Defendant points to no evidence that he was angered by the comment on his appearance in Cruz's sunglasses, let alone evidence that his "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) Absent any evidence that defendant acted in the heat of passion resulting from provocation by Olivarria, Benevides, Rangel and Cruz, it is not reasonably likely the jury would have convicted defendant of voluntary manslaughter had Special Instruction S1 not been given. Defendant's claim of error therefore has been waived. (*People v. Rivera*, *supra*, 162 Cal.App.3d at p. 146.)

Cumulative Error

Defendant contends that cumulative constitutional error mandates reversal of his conviction. Inasmuch as we find no error, we reject defendant's contention.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

I concur:

SUZUKAWA, J.*

I concur in the judgment only:

VOGEL, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.